CHECK AGAINST DELIVERY

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'Contempt – A Balancing Act

Balancing the freedom of the press with the fair administration of justice'

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Thank you Vice Chancellor and good evening Ladies and Gentlemen – I rather suspect that is the first time Her Majesty's Attorney General has been introduced to an audience by a former NASA scientist![1]

In 1755 Samuel Johnson published his famous 'Dictionary'. It attracted wide applause and left an immense mark on its age – but not all approved of this triumph. The Commissioners of Excise were particularly unhappy to find the dictionary described the word 'Excise' thus:

'A hateful tax levied upon commodities and adjudged (by) wretches hired by those to whom the excise is paid'

The Commissioners, perhaps understandably, took objection at being described as 'wretches' and consulted the Attorney General, Sir William Murray, as to the merits of bringing proceedings against Johnson. Now, Sir William was a sensible fellow (as indeed are most Attorneys!) and could see a storm in a tea cup when he saw one – the

[1] Vice Chancellor, Paul Curran, formerly worked as a research scientist at the NASA Ames Research Centre in California. He is a leading light in the field of ecological Earth observation.

Commissioners were advised that though the definition was actionable it was prudent not to prosecute.

I rather suspect Sir William recognised that often it is better to allow freedom of expression rather than to attempt to stifle it - even if it at times this may result in hurt feelings.

But, as I will explain this evening, it is not always easy to balance freedom of expression with the needs of the Justice system. I hope, however, to demonstrate that as Attorney General I see my role as both defender of press freedom and the fair administration of Justice.

I would like therefore to consider the following:

- my role as Attorney General in the context of the press;
- the right to press freedom;

- the right to a fair trial;
- the steps which I have taken over the past year to protect these rights;
- and finally the future work needed

The role of Attorney General:

Although I am the principal legal adviser to the Government, it is important to note that I have other official roles as Attorney General. Many of the functions which I daily perform require me to act as Guardian of the Public Interest.

In this role I act alone. A former Attorney, Lord Simon, once said that the Attorney General 'should absolutely decline to receive orders from the Prime Minister or cabinet or anybody else'. This independence extends to the press and other politicians. If someone was to approach me at the House of Commons and attempt to influence one of my decisions I can assure you they would be sent away with a flea in their ear! All of which, does not make for popularity - it is perhaps unsurprising that the role has previously been described as leading to days of 'toil and trouble'[2].

As Guardian of the Public Interest I intervene in certain charity and family law cases; I will from time to time try to assist the Courts by acting as an impartial friend of the court, either in person or by appointing special advocates to help with questions of law; I will also take action to restrain so called vexatious litigants, that is those who wish to abuse the process of the court system; I also have a role in certain cases in deciding whether a death should be referred to the High Court for an order that an inquest be held – a good example of this is the case of Dr David Kelly; and, in certain criminal cases, my consent is required before proceedings may be brought - again a process wholly independent of my position as a Government Minister.

[2] Lord St Leonards – Solicitor General 1829-30

And it is as Guardian of the Public Interest that I act in cases of contempt – it is this role which requires me to consider carefully the competing interests of press freedom and the fair administration of Justice.

Freedom of the press:

The Magna Carta, signed in 1215, is silent on the question of freedom of expression. Although it provides, among other things, for a standard measure for wine, ale and corn and that no towns shall be obliged to build bridges over rivers – King John and his Barons do not appear to have been overly concerned that people should be free to express themselves.

Given the tenor of the times, this is perhaps no surprise. In 1275, for example, the crime of 'scandalum magnatum' was created to protect the great men of the state from statements which could make the lower orders think badly of them.

There was also the offence of seditious libel, a somewhat primitive precursor to the sentencing principle of three strikes and you're out. A first time offender would be punished by having their ears cut off; and, for a second offence, the stumps of the ears would be removed and the initials 'SL' branded on the forehead!

A superinjunction is slightly less painful!

John Milton saw freedom of expression as being at the very heart of what made a nation strong:

‘Lords and Commons of England, consider what nation it is whereof ye are: a nation not slow and dull, but of quick and ingenious and piercing spirit. It must not be shackled or restricted. Give me the liberty to know, to utter and to argue freely according to conscience, above all liberties’[3]

Well, nobody wants to be accused of being slow and dull!

And describing a press, which was critical of politicians, President Kennedy said:

‘Even though we never like it, and even though we wish they didn’t write it, and even though we disapprove, there isn’t any doubt that we could not do the job at all in a free society without a very, very active press’

Freedom of expression is now enshrined in Article 10 of the European Convention. But, as is so often the case with Convention rights, there is slightly more to Article 10 then the headline grabbing phrase ‘freedom of expression’. Often forgotten, overlooked or conveniently ignored, but equally important, Article 10 also says more, and I think it is important to quote this in full:

‘The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or

[3] Aeropagitica

crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

Duties and responsibilities, governed by the law. There will at times be exceptions to this right, admittedly they must be strictly construed and narrowly interpreted and convincingly established but they exist all the same. And, if society is to function, if we are to avoid anarchy, all of us who enjoy this right (and it is all of us, not just the press) must recognise the need to show at times restraint not to say humanity. If a free press is at the heart of democratic society, it is essential it should act responsibly.

Responsibly - particularly in the context of the Justice system - for if freedom of expression is provided for by the Convention so too is the right to a fair trial and as Attorney General I am determined to ensure that right too is protected.

The Right to a fair trial:

I sincerely hope that none of you will ever find yourself before a court; and I particularly hope that you are never accused of a crime of which you are innocent – but consider for the moment that something has gone horribly wrong and you have been arrested by the police.

You know that you are innocent, you are sure there will be people who will come forward and support you. But all the while, beyond the concrete walls of your cell, a

media frenzy has begun in which you are condemned, tried and convicted all without benefit of a trial.

And we all know that sadly mistakes are made and at times those who should not be arrested are and are falsely accused. In that circumstance it is so very important that there is a fair trial process with all the protections which years of experience have seen put in place.

And, even if you are not innocent at all, but very guilty, it is also essential that these safeguards are in place because, until guilty pleas are taken or the evidence tested, it is rash and unfair to jump to conclusions.

Thus we have rules of evidence to ensure only material which is probative goes before the court; we have legal representation; there is an independent Judiciary, who ensure fairness to both defence and prosecution; and we have that bastion of liberty - the jury. Each plays a crucial role in preserving the right to a fair trial which is provided by Article 6 of the Convention.

And if you were sitting, wrongly accused, in the dock you would very much hope that these rights were being protected. I have seen it with the clients I have represented and those I have prosecuted.

For example, if there was evidence of previous wrongdoing on your part, which while making you appear a bad person, was not relevant to the trial, I am sure you would hope it would not be mentioned to the jury. Under the system which we operate,

generally speaking no such evidence can be given to the jury until a very thorough and considered review has been completed by the Judge. It is the Judge who will know the case, will know the relevance of the evidence and will know if it is appropriate to admit the evidence against you.

Imagine then, how you would feel if the Judge, after careful and considered thought, ruled the evidence should not be admitted, but a newspaper, before or during your trial, printed full details of what you had previously done. The paper is unlikely to know all of the detail of the case, it is unlikely to know the relevance of certain aspects of the evidence – in short it is in no position to usurp the role of the Judge and decide it knows better and that its readership, which may include the jury members, should know more.

It is for this reason that we have the Contempt of Court Act 1981.

Let me be clear the Act is not intended to prohibit or restrict free speech – far from it. The Act was in fact introduced as a liberalising measure following a decision, in 1979, of the European Court of Human Rights. In the case of Sunday Times v the United Kingdom, the Court had concluded the law of contempt in England and Wales breached Article 10. The Act was designed to harmonise our law with the Court's judgment. It sets limits on the points in time at which publishers will be in danger of committing contempt; it protects a journalist's sources from disclosure; protects the secret discussions of the jury in their retiring room; and provides a defence in respect of the discussion of public affairs. It also provides for 'strict liability contempt'.

This contempt is called strict liability as individual journalists or editors may commit the contempt without any intention of prejudicing legal proceedings. It is enough that they publish material which creates a substantial risk that Justice will be seriously impeded or prejudiced.

For breaching this rule - a publisher can face an unlimited fine and an individual 2 years imprisonment.

As those of you who are students of journalism studying here will already have learnt, proceedings for strict liability contempt require either my consent or that of the court.

The rule comes into play when proceedings are active and, in the context of a criminal case, this means from the time of arrest. So the suspect held in the police cell is, and should be, as protected as the defendant on trial before a court.

Should an article be published which breaches the strict liability rule, for example details of a defendant's bad character which has not been admitted in evidence, then, when appropriate, I will act to ensure the fairness of proceedings is preserved. Over the last year I have taken steps to do just that.

The year past – a retrospective:

I have been concerned, even before I was appointed Attorney General, at what I perceived to be the increasing tendency of the press to test the boundaries of what was acceptable over the reporting of criminal cases. At times it appeared to me the press

had lost any sense of internal constraint and felt able, indeed entitled, to print what they wished, shielded by the right of 'freedom of expression' without any of the concomitant responsibilities.

The creation of the bad character provision, contained within the Criminal Justice Act 2003 and which allows a defendant's previous convictions to be admitted in evidence, has I suspect exacerbated this trend. The potential to admit evidence of a defendant's previous convictions has led some in the press to believe they can print, without let or hindrance, all manner of true facts, abuse and nonsense. But, as I previously said, the admittance of bad character is subject to Judicial oversight and requires careful consideration. And the Act is not an excuse for the press to throw responsible reporting to the wind.

I was concerned that, uncontrolled, such reporting could eventually undermine the jury system. Jurors must reach a verdict solely on the basis of the evidence presented to them in court. This is enshrined in the oath which they take, a promise 'to give true verdicts according to the evidence'.

It is essential therefore that jurors are not contaminated by material which has not been presented to them as evidence – it is only upon the evidence that their verdict must be based. The Justice system has carefully constructed rules and protections for those parties who come before the court - both victims and defendants – and it is important those protections are not circumvented or ignored.

Some have suggested we should not worry about juries knowing this kind of information. But, I would suggest, it does matter. Apply it to yourselves. Even for a trained judge, excluding such information from influencing one's judgment is difficult.

So, when I assumed Office, I was determined to ensure that some clarity was re-introduced to the process in those cases. Over the last year I have asked the Courts to consider a number of cases in which I believed contempt had been committed. The first two involved the press, the last a juror and Facebook.

The first case involved the internet and online publications. At the start of a murder trial, in which the defence was one of self defence, The Daily Mail and Sun both published a photograph of the defendant holding a pistol, with his finger on the trigger. The Daily Mail article had the caption 'Drink-fuelled attack: Ryan Ward was seen boasting about the incident on CCTV'. For 4 hours and 54 minutes the picture remained online - accessible to all who viewed the article, particularly those interested in the trial.

The Sun in its hard copy also published the photograph but in a cropped and edited format. Unfortunately the online edition of the paper failed to do the same. At 1.22am the following morning, the full un-cropped picture went online; and there it remained until the evening of the 4th November, when it was removed at the request of the Police officer in the case.

A jury had been sworn and given instructions and guidance by the Judge, not the least of which was that they should not consult the internet. They had been

warned that they were to try the defendant on the basis of the evidence which they heard and saw in court.

After careful investigation by the Judge, it was apparent none of the jurors had seen either article; and fortunately the trial was able to continue with the defendant subsequently being convicted. The Judge said, however, that there was a prima facie case of contempt. Despite these publications having been on the internet, I agreed and initiated proceedings for contempt.

At trial, the Court noted that this was the first time they had been asked to consider whether an online publication was a contempt of court.

The Court said it was necessary to assess the risk posed by the articles at the time it was created. It noted that the assessment of risk is a prospective exercise requiring the Court to look to the future effect of a publication. Thus, although the jury had not seen the articles this did not demonstrate that there had not been a substantial risk that they would have done so.

The Court stated the Judge's directions to the jury not to research the case would not have extended to prohibiting them from reading newspapers. As such a juror was entitled to read online reports of the trial. In this circumstance, the Court believed that there was a substantial risk a juror would read the articles online and therefore see

the offending photograph – a photograph which could not have failed to create an adverse impression. It was, the Court said, prejudicial in a manner directly relevant to the issues in the case.

Each paper was fined £15,000 and ordered to pay costs of £28,117.

This case demonstrates the law of contempt does reach into the internet.

The second case involving the press is one which, whilst attracting a large amount of attention, related to an age old problem – a media feeding frenzy, fuelled by a murder investigation. The case of Christopher Jefferies - who as he said himself in a recent BBC interview, became a household name 'for all the wrong reasons'.

Mr Jefferies was arrested on suspicion of having murdered his tenant, Joanna Yeates. As we now all know, Mr Jefferies had nothing whatsoever to do with the death of Ms Yeates – but at the time of his arrest and whilst in custody, there was a torrent of reports which, in my view, were highly prejudicial.

Over two days, the Daily Mirror ran articles linking Mr Jefferies to paedophiles, sexual abuse, and an unsolved murder in the same area. The articles referred to him as an oddball. The Sun alleged Mr Jefferies had stalked a woman of a similar age and appearance to Joanna Yeates and suggested he had been over familiar with his tenants and had been given the nickname 'Hannibal Lecter'.

I was satisfied there was a substantial risk these articles would both seriously prejudice and seriously impede the course of Justice and commenced proceedings for contempt.

The Court looked closely at the issue of impediment to the course of Justice. As the Lord Chief Justice stated this is a path which has been 'less well trodden'. The Court said Mr Jefferies had been vilified to such an extent that potential witnesses might have been discouraged or deterred from coming forward and providing information helpful to Mr Jefferies. Some might be reluctant to be seen to be associated with a man accused of appalling crimes. Others might doubt the validity of favourable information which they had in the light of the material vilifying him and thus not come forward. Despite all the protections provided by the trial process, the evidence heard at trial ran the risk of being incomplete, the existence of additional evidence unknown.

The Court ruled the articles published by both papers would have been extremely damaging to Mr Jefferies and his defence. They constituted contempt under the strict liability rule. This reinforced the message that proceedings are active from the time of arrest. Caution, not to say common sense, must therefore come into play when reporting on a case involving an arrested suspect - a suspect who may never be charged.

And, although not a legal consideration, I would suggest there is a moral imperative in all of this - the need to observe common decency when reporting on such cases.

Christopher Jefferies, the wholly innocent Christopher Jefferies, has spoken of how 'lurid' reporting wove 'extraordinary falsehoods' around him. He has told of how he is only now getting his life back together. Putting to one side the risk to the course of justice – this is the damage which sensational reporting can inflict on an individual. Think again of the hypothetical situation in which you are sat alone in a cell – innocent but vilified.

The last case which I would like to mention involves something with which I suspect many of you are very familiar – Facebook.

A defendant in a trial had been acquitted of the charges she faced but the jury continued to consider their verdicts regarding her co-defendants. The night of her acquittal, one of the jury decided to go online and chat on Facebook.

Unfortunately she chose to track down the acquitted defendant on Facebook and proceeded to let her know her thoughts on the trial and the ongoing debate in the jury room. Knowledge of jury discussions is forbidden to all outside the jury. It is an offence under the Contempt of Court Act 1981 to 'obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings'

In this case the juror and the former defendant engaged in a Facebook chat about what was happening in the jury room. Their conduct came to the attention of the Judge and eventually to me. Again, in my Public Guardian role, proceedings for this type of contempt of court cannot be instituted save by or with my consent or on the motion of a court having jurisdiction to deal with it. I concluded a contempt had been committed.

The juror admitted her contempt and was committed to prison for 8 months. The former defendant denied wrongdoing but, after a brief trial, was found also to be in contempt – she too was committed for 2 months, although in her case the order was suspended for 2 years as she had been on remand for some months before the trial of the original matter.

The case highlighted important principles and again that the internet does not provide some form of immunity from prosecution. Jurors must feel able to openly express their views and opinions to their fellow jurors without fear that they will be subjected to public exposure and possible ridicule or disgust. This prevents juries from being inhibited as they discuss the merits of the evidence which they have heard. It is essential that the sanctity of the jury room is preserved.

The revolution in methods of communication cannot change what the Lord Chief Justice has termed ‘essential principles’ and that is why contempt proceedings will be brought by me when required.

Before turning to what I hope can be achieved in the future, I would like to touch briefly upon a related contempt issue which has raised its head this year – the issue of Parliamentary privilege and the press.

In recent months certain members of Parliament, from behind the shield of Parliamentary privilege which protects them from punishment, have seen fit to reveal details of injunctions imposed by the Courts. I am a proud Parliamentarian, I recognise and will defend the privileges conferred by the Bill of Rights and the right of the House to regulate its own business. But it is important to remember these are the privileges of Parliament as a whole and not that of the individual member.

It ill serves the Parliamentary process if Court orders are openly flouted for no good reason. It is not for a Parliamentarian to ignore the careful and measured approach of a Judge when deciding if an injunction should be granted. There are well established principles of comity between Parliament and the Courts and the House of Commons has resolved that the sub judice rule applies to proceedings which are active and they shall not be referred to in any motion, debate or question. Parliament and the Courts should each be left to do their work without interference by the other – save in the most exceptional of circumstances.

And, for the journalists amongst your number, a note of caution – it is still an open question as to whether something said in Parliament in breach of a court order may be repeated in the press. The privilege to report Parliamentary proceedings, which is provided by the Parliamentary Papers Act and protects Hansard, does not necessarily extend to all publications which are not published by order of Parliament. It is likely

that it does extend to a fair and accurate report of proceedings in Parliament. But just because something has been said does not mean it can be repeated out of context.

This question has yet to be authoritatively decided but will shortly be considered further by Parliament. But in the interim - writer beware!

The work of the future:

Despite bringing contempt proceedings which I have thought necessary in the Public Interest, I trust that the record will also show I have endeavoured to work constructively with the press. It is my wish to engage with the press and in so doing, not only to explain why I have acted as I have, but also to seek to build a measure of consensus for the future.

Over the past year I have engaged in numerous meetings with the press and journalists most recently at the BBC

and the Press Complaints Commission – the PCC. I am particularly pleased to have an opportunity to speak here tonight at the City University, School of Journalism. This is a respected institution, I believe the 'Independent' has referred to its 'legendary status', and is currently providing training to students from 36 different countries - with many distinguished alumni. Such meetings provide a useful forum for me to hear from practitioners and students and to understand better the pressures faced both by those editing stories and those providing legal advice.

One of the points which I have taken away from these meetings is that the press would welcome more advisory notices.

From time to time, when media reports are clearly becoming overheated and risk straying into the territory of contempt, I will issue a warning to the press about their reporting. These are called advisory notices, and highlight potential problems with press coverage of a case or incident. They are not for publication and are circulated to the legal departments of major press organisations. In recent years it has been the practice to only issue an advisory in the most extreme of cases – I did so in the case of Mr Jefferies and have done so in other recent cases and often the effect seems to have been helpful.

To a certain extent it is understandable that editors and their legal advisers wish to see more such guidance issued and I am carefully considering how best I can assist. But it must also be recognised that I do not act as legal adviser to the press – media organisations employ teams of lawyers to consider these very issues. There is a danger, that should I fail to issue an advisory, there will be an assumption that it is open season. This would be a dangerous conclusion to draw. Absent an advisory, when deciding if something risks being deemed contemptuous, I would suggest looking carefully at what the law says, the cases previously described and applying some common sense principles of fairness.

Indeed, at the pre-charge stage, before any decision has been made as to sufficiency of evidence, there is much to be said for the formula - in common currency when I was a

boy - that a man is helping police with their enquiries. So doing, avoids providing unnecessary detail which,

potentially, leads to the vilification of someone later shown to be wholly innocent – Mr Jefferies springs to mind.

As mentioned, I have met this year with the PCC and I very much welcome the appointment of Lord Hunt as Chairman. He has an unenviable task, but I wish to continue to engage with the PCC, and if it can work effectively then I would be happy to see it do so.

In the coming years there will inevitably be an increase in the power and role of the internet in reporting both the courts and events across the globe.

We have seen in recent years not only the rise of social media but also the blog and the citizen journalist. Unlike major news organisations, which on the whole act in a responsible and measured manner, the inhabitants of the internet often feel themselves to be unconstrained by the laws of the land. There is a certain belief that so long as something is published in cyberspace there is no need to respect the laws of contempt or libel. This is mistaken.

Whilst I accept the danger posed to the administration of Justice by many bloggers is minimal, we should not underestimate the potential for a blog or tweet to go viral. As incautious city bankers and brides to be have discovered to their cost, comments on the web can soon be published far beyond their original, limited audience. And I use

the word published advisedly, as publication is of course the phrase used within the Contempt of Court Act - an online article which breaches the strict liability rule runs the risk of running afoul of the law of contempt.

As I said earlier, it is my belief that hitherto the press has been pushing at the boundaries and in a sense has subtly been seeking to explore what is or isn't acceptable. Now, I am not here to act as some sort of arbiter of morals nor is it any role of mine to provide legal advice to editors and journalists – but I hope the events of recent months have introduced a degree of clarity. My sole aim in bringing these cases is to ensure that Justice is done.

I do not seek confrontation and I have no desire to act as a policeman. I hope that in the months to come I can work with and not against the press. These are difficult times for the media and I am very aware of this. The pressure to maintain circulation, to beat competitors and to capture the attention of the reader - has never been greater. The inexorable rise of the internet and the citizen journalist presents us all with challenges for the future. We must work in collaboration to ensure the highest professional standards are maintained at the same time as press freedom.

A free press, acting professionally and ethically will ensure our own individual freedoms – corruption can be exposed, wrongdoing unearthed and government held to account – all of which is to the good and essential for a vibrant and healthy democracy. As long as I am Attorney General I will seek to preserve the right and ability of the press to do so.

CHECK AGAINST DELIVERY

In 1839 the Newspaper Press Benevolent Association gave a dinner in honour of a former Attorney General, Sir John Copley. He was praised by his political adversary, Lord Brougham, who noted that the conduct of the press had been such 'there was not a day during the time he was Attorney General in which he might not have filed an information' but Copley's maxim when dealing with the press had been 'only to prosecute where there was such grave cause as rendered such a proceeding necessary'

So long as the freedom of the press is in balance with the fair administration of Justice I will be satisfied to follow that maxim.

ENDS

5,330 words